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Supreme Court, U.S.
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NO. ____ CAPITAL CASE

In The
Supreme Court of the United States

JAMES RANDALL ROGERS,
Petitioner,

v.

STATE OF GEORGIA,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Georgia

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether the execution of Petitioner Rogers, who suffers from severe organic brain damage and significantly sub-average intelligence that interferes with his mental capacity and ability to function, who manifested impairments in adaptive behavior similar to those found in mentally retarded individuals during his development, and who was just 19 years and one month old at the time of the crime, would violate the Eighth Amendment's proscription against cruel and unusual punishment and the Fourteenth Amendment right to equal protection.

(2) Whether the Georgia trial court denied Petitioner Rogers assistance of counsel in violation of *United States v. Gonzales-Lopez*, 548 U.S. 140, 126 S. Ct. 2557 (2006), and the Sixth Amendment when it refused to permit Rogers' chosen, *pro bono* counsel – the only counsel who was prepared – to argue critical pre-trial motions at his mental retardation hearing.

(3) Whether the Georgia trial court's use of civil trial procedures at Petitioner Rogers' mental retardation hearing, instead of the criminal procedures requisite to the continuation of Rogers' criminal trial, violated Rogers' rights to due process and equal protection.

PARTIES TO THE PROCEEDINGS

There are no parties to the proceeding other than those listed on the caption.

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The Georgia Supreme Court's opinion is published at *Rogers v. State*, 282 Ga. 659, 653 S.E.2d 31 (2007), and included in Appendix A, pages 1a – 16a. The Georgia trial court entered judgment on a jury verdict on September 19, 2005, without a published opinion. A prior Georgia Supreme Court opinion, holding that Petitioner Rogers was entitled to a jury trial on the issue of mental retardation, is published at *Rogers v. State*, 276 Ga. 67, 575 S.E.2d 879 (2003), and included in Appendix B, pages 17a – 25a.

JURISDICTION

On November 5, 2007, the Georgia Supreme Court issued its Order affirming the judgment that Petitioner Rogers is not mentally retarded. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment VI to the United States Constitution guarantees that:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

Amendment VIII to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment XIV to the United States Constitution, section 1, provides, in relevant part:

> Nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner James Randall Rogers seeks to appeal Georgia court rulings that he is not mentally retarded and thus can be subjected to capital punishment. The execution of Petitioner Rogers would constitute cruel and unusual punishment in contravention of the Eighth Amendment and violate his right to equal protection of the law in contravention of the Fourteenth Amendment, because (1) Rogers indisputably suffers from severe organic brain injury, brain dysfunction and sub-average intelligence, (2) Rogers manifested impairments in his adaptive behavior akin to those suffered by mentally retarded persons during his development, and (3) Rogers was only nineteen years and one month old at the time of the crime and demonstrated the same immaturity and impetuousness of juveniles just one year and one month younger than him.

Moreover, because the Georgia trial court deprived Petitioner Rogers of the assistance of counsel and denied him due process and equal protection by

treating the mental retardation proceedings as civil, instead of criminal, the verdict should be overturned.

Psychologists who evaluated Petitioner Rogers' neuropsychological functioning unanimously concluded that he suffered from organic brain injury and severe brain dysfunction. Dr. Robert H. Connell, who testified for the State, evaluated Petitioner Rogers in 1984, and diagnosed "mixed organic brain syndrome." On the Halstead-Reitan test administered by Dr. Connell, Petitioner Rogers' scores were within the pathological range on all but one measurement – indicating brain damage and dysfunction. Indeed, Rogers scored .9 out of 1.0 – the second highest score, with any score above .5 on the scale indicating overall brain dysfunction, and higher scores reflecting more severe damage and dysfunction. Dr. Connell also concluded that Petitioner Rogers had significantly sub-average intellectual functioning, that he was unable to readily process complex information, that he was confused and frustrated when stimulation came from multiple sources, and that he could be expected to be very impulsive.

Dr. Mark Zimmerman, who testified for Petitioner Rogers, evaluated him in 1994. Dr. Zimmerman used the Luria-Nebraska neuropsychological battery – another test that evaluates brain dysfunction. The results showed significant diffuse brain dysfunction in both sides of the brain, and in all areas where Rogers receives, processes and attempts to evaluate information. Dr. Connell agreed that the Luria-Nebraska test was another reliable measurement of brain dysfunction and that the results obtained by Dr.

Zimmerman were consistent with Dr. Connell's evaluation.

Although Petitioner Rogers' IQ scores have varied, all of his IQ scores have been consistent with significantly sub-average intellectual functioning. With 100 indicating the "average" IQ, Rogers' test scores have never come close:

Tester	Test	Score
Hark 1977	WAIS	80
Hark 1980	WAIS	84
Connell 1984	WAIS-R	85
Fisher 1995	WAIS-R	66
Zimmerman 1994	Stanford-Binet	68

Petitioner Rogers also manifested severe impairments in adaptive behavior during his developmental period. First, his school records demonstrate this impairment. From kindergarten through the time he dropped out of school in the seventh grade, his performance was abysmal. Despite excellent attendance during his early school years, his grades were typically "U," for "unsatisfactory." He even failed homeroom during the first two quarters of seventh grade, after which he permanently dropped out of school. He had difficulty getting along with others and a history of aggression toward his teachers during his limited time in school.

Second, Petitioner Rogers' very limited work record also evidences impairment in adaptive behavior. After dropping out of school, and before his incarceration for murder at the age of 19, he held two menial jobs. First, he worked moving spools from one place to

another at a cotton mill. Then, he shoveled asphalt for a construction company. Rogers only worked in each job for a short period of time because he could not do either well enough to stay employed.

Finally, Rogers also had a history of behavioral problems that indicated impairments in adaptive behavior and the ability to engage in logical reasoning. By age 16, Rogers had been detained at the Regional Youth Detention Center on three difference occasions and spent five months at the State Youth Detention Facility. In May 1977, at age 16, Rogers was sent to the Regional Youth Detention Center again, after he attempted to set fire to the city jail -- while he was incarcerated in it. Less than three years later, he committed the crime for which he was sentenced to death.

REASONS FOR GRANTING THE PETITION

I. The Execution Of Petitioner Rogers Would Violate The Eighth Amendment's Proscription Against Cruel And Unusual Punishment And His Fourteenth Amendment Right To Equal Protection.

The Eighth Amendment prohibits "[e]xcessive" sanctions. It provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. . . . The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Atkins v. Virginia*, 536 U.S. 304, 31-121, 122 S. Ct.

2242, 2247 (2002) (quoting *Trop v. Dulles*, 356 U.S. 86, 100-01, 78 S. Ct. 590 (1958)).

Because the death penalty is the most severe punishment, the Eighth Amendment applies to it with special force. *Thompson v. Oklahoma*, 487 U.S. 815, 856, 108 S. Ct. 2687 (1988) (O'Connor, J., concurring in judgment). Accordingly, capital punishment must be limited to those offenders who commit "a narrow category of the most serious crimes" and whose extreme culpability makes them "the most deserving of execution." *Atkins*, 536 U.S at 319, 122 S. Ct. 2242.

In *Atkins*, this Court noted that multiple deficiencies in the mental functioning of mentally retarded individuals diminish their personal culpability. *Id.* at 318, 122 S. Ct. at 2251. Those deficiencies include:

(a) diminished capacity to understand and process information;

(b) diminished capacity to communicate;

(c) diminished capacity to abstract from mistakes and learn from experience;

(d) diminished capacity to engage in logical reasoning;

(e) diminished capacity to control impulses;

(f) diminished capacity to understand the reactions of others; and

> (g) diminished capacity to act pursuant to a premeditated plan rather than acting on impulse.

Atkins, 536 U.S. at 317, 122 S. Ct. at 2250. These impairments of mentally retarded offenders make it less defensible to impose the death penalty as retribution for past crimes and less likely that the death penalty will have any real deterrent effect on mentally retarded individuals. *Id.* at 319-20, 122 S. Ct. 2242. Thus, this Court held that capital punishment as applied to mentally retarded individuals violates the Eighth Amendment:

> Construing and applying the Eighth Amendment in the light of our "evolving standards of decency," we therefore conclude that such punishment is excessive and that the Constitution "places a substantive restriction on the State's power to take the life" of a mentally retarded offender.

Id. at 321, 122 S. Ct. at 2252.

Likewise, in *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183 (2005), this Court held that the immaturity of juveniles diminishes their culpability and renders the execution of a juvenile for a crime committed before his or her eighteenth birthday cruel and unusual punishment in violation of the Eighth Amendment.

In *Roper*, this Court noted that three general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot reliably be

classified among the worst offenders. First, "[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions." *Roper*, 543 U.S. at 569, 125 S. Ct. at 1195 (quoting *Johnson v. Texas*, 509 U.S. 350, 367, 113 S. Ct. 2658 (1993)).

Second, juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure because they have less control, or less experience with control, over their own environment. *Id.* (citing *Eddings v. Oklahoma*, 455 U.S. 104, 110-12, 102 S. Ct. 869 (1982)). Finally, the character of a juvenile is more transitory and not as well formed as that of an adult. *Id.* at 570, 125 S. Ct. 1195.

Because of these significant differences between juveniles and adults, this Court reasoned that any conclusion that a juvenile could be classified among the worst, or most culpable, offenders is suspect. Rather, the susceptibility of juveniles to immature and irresponsible behavior means that "their irresponsible conduct is not as morally reprehensible as that of an adult." *Id.* (quoting *Thompson*, 487 U.S. at 835, 108 S. Ct. 2687).

Petitioner Rogers was 19 years and one month old at the time of the crime. The evidence demonstrates Rogers' immaturity and impetuousness, consistent with the characteristics of juveniles just one year and one month younger than him. This Court, of course, recognized that the 18-year old threshold was

arbitrary, but the evidence here further demonstrates that Rogers suffered from diminished capacities that coincided with those of mentally retarded persons. Rogers' IQ scores were indisputably significantly sub-average, and he suffered from organic brain injury and severe brain dysfunction. Psychologist Robert Connell -- the State's witness at Rogers' mental retardation hearing -- testified that Rogers had:

> (a) a diminished capacity to understand and process information;
>
> (b) a diminished capacity to communicate in complex situations or when there are a lot of stimuli requiring quick interpretation and response;
>
> (c) a diminished capacity to abstract from mistakes and learn from experience;
>
> (d) a diminished capacity to engage in logical reasoning;
>
> (e) a diminished capacity to comprehend;
>
> (f) a diminished capacity to control his impulses; and
>
> (g) a diminished capacity to think things through rather than acting on impulse.

(T. 1864-68).

Because Petitioner Rogers had sub-average intelligence, suffered from similar diminished

capacities as mentally retarded individuals, demonstrated the same immaturity as juveniles, and manifested impairments in his adaptive behavior during his development, he – like juveniles and mentally retarded individuals – has diminished personal culpability. Thus, Rogers cannot be found to be one whose "extreme culpability" is the "most deserving of execution." To the contrary: the imposition of the death penalty on Petitioner Rogers would constitute cruel and unusual punishment in violation of the Eighth Amendment.

Moreover, because the State cannot constitutionally impose capital punishment on juveniles or on the mentally retarded, the imposition of the death penalty on Petitioner Rogers, who shares similarly diminished capacities, would violate his right to equal protection of the laws under the Fourteenth Amendment. The Equal Protection clause means, and is a guarantee, that all persons subjected to state legislation shall be treated alike, under like circumstances and conditions, both in privileges conferred and in liabilities imposed. *See, e.g., State of La. ex rel. Francis v. Resweber,* 329 U.S. 459, 465 67 S. Ct. 374 (1947). The execution of Rogers, who shares similar diminished capacities of those who are mentally retarded in light of the Constitutional prohibition against the execution of the mentally retarded would be a denial of the fundamental right to equal protection of the laws.

II. Petitioner Rogers Was Denied Assistance Of Counsel In Violation Of *United States v. Gonzales-Lopez*, 548 U.S. 140, 126 S. Ct. 2557 (2006), And The Sixth Amendment.

During Petitioner Rogers' pre-trial proceedings, the trial court, without warning or prior notice, flatly refused to permit Rogers' selected *pro bono* counsel – the only attorney who had prepared to argue multiple, complicated pre-trial motions regarding conflicts of interest and the qualifications of a purported expert for the State to present argument. Instead, the trial court required another attorney, without prior warning or notice, to argue the motions on Rogers' behalf. (Tr. at 757-58; 796-97).

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." An important element includes "the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire, or who is willing to represent the defendant even though he is without funds." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 126 S. Ct. 2557, 2561 (2006). There is no dispute that Rogers requested that the counsel who had prepared argument represent him. And there is no dispute that the trial court flatly, without prior notice that he would hear argument only from part of Rogers' defense team, refused to permit her to argue the motions on Rogers' behalf.

As this Court has explained:

> Where the right to be assisted by counsel of one's choice is wrongly denied . . . it is unnecessary to conduct an ineffectiveness or prejudice inquiry to establish a Sixth Amendment violation. Deprivation of the right is "complete" when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of representation he received.

Id., 126 S. Ct. at 2563. Said another way, "erroneous deprivation of the right to counsel of choice, 'with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as 'structural error.'" *Id.*, 126 S. Ct. at 2564 (quoting *Sullivan v. Louisiana,* 508 U.S. 275, 282, 113 S. Ct. 2078 (1993)). Thus, where a defendant, like Petitioner Rogers, is denied the assistance of the counsel of his choosing, there is no need to demonstrate prejudice due to the deprivation. The deprivation itself constitutes a structural error in the trial, requiring reversal.

III. The Georgia Trial Court's Use Of Civil Jury Selection Procedures At Petitioner Rogers' Mental Retardation Hearing, In Lieu Of The Criminal Procedures Requisite To The Continuation Of Rogers' Criminal Trial, Violated Rogers' Due Process and Equal Protection Rights.

After Petitioner Rogers' conviction, Georgia enacted a statute that prohibits imposition of the death penalty for mentally retarded individuals. *See* O.C.G.A. § 17-

7-131(j). The Georgia Supreme Court, following the enactment of the statute, held that the execution of any mentally retarded individual, regardless of when the conviction occurred, violates the Georgia constitution's proscription against cruel and unusual punishments. *See Fleming v. Zant*, 386 S.E.2d 339 (Ga. 1989), *overruled on other grounds by State v. Patillo*, 417 S.E.2d 139 (Ga. 1992). Thus, individuals who were convicted of a capital offense prior to the enactment of the Georgia statute have, like those convicted following the enactment of the statute, been permitted to raise the issue of mental retardation in regard to whether the death penalty can apply.

Georgia has developed procedures governing mental-retardation challenges to the imposition of the death penalty. Pursuant to these procedures, the mental retardation hearing is deemed to be a continuation of the guilt-innocence phase of the original trial. *See Fleming v. Zant*, 386 S.E.2d 339 (Ga. 1989), *overruled on other grounds by State v. Patillo*, 417 S.E.2d 139 (Ga. 1992); *Stephens v. State*, 509 S.E.2d 605, 609 (Ga. 1998) ("This procedure is designed to ensure that a defendant has 'essentially the same opportunity to litigate the issue of his mental retardation as he would have had if the case were tried today, with the benefit of the O.C.G.A. § 17-7-131(j) death-penalty exclusion.'"). As such, mental retardation hearings are *criminal* proceedings. To treat them otherwise, as the Georgia trial court below did in several key respects, is a denial of due process and equal protection, requiring reversal.

A. Rogers Was Not Permitted The Correct Number of Peremptory Challenges.

As this Court has noted, the right to exercise peremptory challenges is "one of the most important of the rights secured to the accused." *Swain v. Alabama*, 380 U.S. 202, 219, 85 S. Ct. 824, 835 (1965), *overruled on other grounds by Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712 (1986). Indeed, "[t]he denial or impairment of the right is reversible error without a showing of prejudice." *Swain*, 380 U.S. at 219, 85 S. Ct. at 835. *See also Harrison v. United States*, 163 U.S. 140, 141, 16 S. Ct. 961 (1896) (noting that where the defendant had received only five peremptory challenges but the proper procedure provided ten, "five persons unlawfully took part as jurors in his conviction" and reversing the conviction); *Frazier v. United States*, 335 U.S. 497, 505, 69 S. Ct. 201 (1948) ("the right [to peremptory challenges] is given in aid of the party's interest to secure a fair and impartial jury").

Petitioner Rogers was originally tried and convicted in 1980. At the time of his original trial, the relevant statute read:

> Every person indicted for a crime or offense may peremptorily challenge 12 of the jurors impaneled to try him. The state shall be allowed one-half the number of peremptory challenges allowed to the accused; provided, however, in any case in which the state announces its intention to seek the death penalty, the person indicted for the crime may

> peremptorily challenge 20 jurors and the state shall be allowed one-half the number of peremptory challenges allowed to the accused.

O.C.G.A. § 15-12-165 (code section prior to 2005 amendment).[1]

In trying the issue of mental retardation, Georgia courts are instructed to recreate a phase of the trial as it would have been conducted initially had the State, at the time of the original criminal trial, prohibited the execution of persons found to have been mentally retarded. *See Stephens*, 509 S.E.2d at 609. Thus, in the present case, if this proceeding had been part of the original trial, Rogers would have had the right to 20 peremptory challenges, twice as many as the State. Instead, however, the Georgia trial court, gave the prosecution and the defendant 15 strikes each. (T. 713). In doing so, the trial court denied Rogers substantial procedural protections that the State itself promised, and provided to, all other criminal defendants, in violation of the Fourteenth Amendment rights to due process and equal protection of the laws. *See Bearden v. Georgia*, 461 U.S. 660, 665, 103 S. Ct. 2064, 2069 (1983) (noting that due process implicates "the fairness of relations between the criminal defendant and the State" while equal protection examines "whether the State has invidiously denied

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[1] Until the 2005 amendment, the Georgia statute permitting a criminal defendant twice as many strikes as the prosecution had been in effect since 1833 with only minor variation. *See Robinson v. State*, 598 S.E.2d 466, 467 (Ga. 2004).

one class of defendants a substantial benefit available to another class of defendants").

B. The Georgia Trial Court Reversed The Order Of Jury Selection And Precluded Rogers From Exercising The Final Jury Strike.

Georgia law provides: "If a juror is found competent and is not challenged peremptorily by the state, he shall be put upon the accused. Unless he is challenged peremptorily by the accused, the juror shall be sworn to try the case." O.C.G.A. § 15-12-166. Thus, in Georgia criminal trials, the State must accept or reject each potential juror **before** the defendant is required to do so. This procedure applies equally in mental-retardation trials. *See Zant v. Foster*, 406 S.E.2d 74, 76 (Ga. 1991), *overruled on other grounds by State v. Patillo*, 417 S.E.2d 139 (Ga. 1992) ("we conclude, contrary to the trial court, that the mental-retardation trial jury should be selected in the same manner as a death-penalty criminal trial jury . . . .").

At Petitioner Rogers' hearing, the Georgia trial court required Rogers to accept or reject each juror before the State did so. After Rogers' counsel asserted that the State should accept or reject each potential juror first, the trial judge rejected that standard criminal procedure:

> THE COURT: . . . . I'm switched over to the civil rules to the extent that I can possibly do that. So, you know, that being the case, you know, you are going to have to go first.

(T. 712). Thus, the trial court refused to follow O.C.G.A. § 15-12-166.

Sakobie v. State, 154 S.E.2d 830 (Ga. App. 1967), is instructive. There, the prosecutor accepted a juror. The defense lawyer then accepted the juror. But, "immediately and almost simultaneously upon" the defense counsel accepting the juror, the prosecutor revoked his acceptance and excused the juror. *Id.* The trial court then excused the juror over the defendant's objection. On appeal, the appellate court affirmed, explaining that:

> the excusing of the juror by the trial judge over the objection of the defendant will not require a reversal, *as the stipulation does not conclusively show that the solicitor general revoked his acceptance and excused the juror after ascertaining the defendant had accepted him. The trial judge was in a much better position than this court to determine the question of fact of split-second time . . . .*

Id. (emphasis added). Thus, the appellate court deferred to the trial court in regard to the factual determination that the prosecutor had not "ascertain[ed]" that defense counsel had accepted the juror before the prosecutor changed his mind. *Sakobie* indicates, however, that if the evidence had shown that the State decided to excuse the juror after learning that the defense accepted the juror, reversal would have been required.

Below, Rogers was forced to exercise each and every one of his peremptory strikes without knowing

whether the State would excuse the potential juror. Thus, the State knew that Rogers had already accepted each and every potential juror that it excused. It is impossible to know whether the State would have excused any or all of the potential jurors whom Rogers peremptorily struck. It is often the last strike that is reserved for a juror who the other side may strike but who otherwise must be struck by – in this case – Rogers. Because of the trial court's erroneous actions, Rogers lost that opportunity.

The State of Georgia, through statute and case law, has provided procedural protections to criminal defendants that require the State to accept or reject each juror before the defendant is required to do so. The trial court had no discretion in this regard, and the failure to follow the procedure outlined in the statute is a denial of procedural protections that requires a new trial. *Cf. Sakobie*, 154 S.E.2d at 831. *See Bearden v. Georgia*, 461 U.S. 660, 665, 103 S. Ct. 2064, 2069 (1983) (noting that due process implicates "the fairness of relations between the criminal defendant and the State" while equal protection examines "whether the State has invidiously denied one class of defendants a substantial benefit available to another class of defendants"). Rogers' mental retardation hearing failed to provide statutory procedural rights and failed to treat Rogers the same as other similarly situated defendants. The Fourteenth Amendment cannot permit this.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted this 4th of February 2008.

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